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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

NETCHOICE.

Plaintiff,

v.

ROB BONTA, in his official capacity as Attorney General of California.

Defendant

Case No. 5:24-cv-07885-EJD

**PLAINTIFF'S REPLY IN SUPPORT OF
MOTION TO STAY PROCEEDINGS
PENDING APPEAL**

Date: March 13, 2025

Time: 9:00 am

Judge: Hon. Edward J. Davila

Courtroom: San Jose, Courtroom 4, 5th Floor

**PLAINTIFF'S REPLY IN SUPPORT OF
MOTION TO STAY PROCEEDINGS PENDING APPEAL**

1 Defendant’s opposition (ECF 62) to Plaintiff NetChoice’s Motion to Stay Proceedings
2 (ECF 59) does not offer any compelling reason why proceedings in this Court must barrel ahead
3 while the Ninth Circuit considers the “novel, difficult, and important” “First Amendment issues
4 raised by SB 976.” ECF 47 at 4. Just as this Court granted an injunction pending appeal “to allow
5 the opportunity for appellate review of these weighty issues,” *id.*, it should stay this case during
6 appellate proceedings. The Ninth Circuit will likely make precedential, binding holdings on ques-
7 tions of law at the core of this case, and those will define the scope of any remaining legal issues
8 and factual disputes. It will most likely dictate what the parties will need to brief, in addition to the
9 scope of what facts are relevant for any potential discovery. A stay of these proceedings will thus
10 efficiently give this Court the benefit of the Ninth Circuit’s ruling while eliminating possibly
11 wasted process in the interim that could contradict the Ninth Circuit’s ruling.

12 Accordingly, this Court should stay proceedings before the parties must submit their pro-
13 posed case management order, on February 28, 2025.

Argument

NetChoice has demonstrated that it satisfies any one of three sufficient criteria for a stay of proceedings: “(1) there is a ‘fair possibility’ of ‘hardship or inequity,’ (2) it would not result in ‘undue delay,’ or (3) . . . ‘it is efficient for [the court’s] docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of [] proceedings which bear upon the case.’” *Harville v. Three Wishes Foods, Inc.*, 2023 WL 4535476, at *1 (N.D. Cal. July 13, 2023) (quoting *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007)).

I. A stay of proceedings would not cause “undue delay.”

Defendant primarily argues that a stay of proceedings would result in “undue delay.” ECF 62 at 2. Yet waiting for appellate proceedings—which probably will resolve core legal issues at the heart of this lawsuit—will result in merely a stay of “short, or at least reasonable, duration.” *Dependable Highway*, 498 F.3d at 1067. As Defendant acknowledges, “the Ninth Circuit[]” is engaging in “expedited consideration of Plaintiff’s appeal.” ECF 60 at 3. NetChoice already submitted its opening brief, and the Ninth Circuit will hear oral argument on April 2, 2025. *Id.* at 1.

1 Accordingly, Defendant's reliance on the outlier facts in *Dependable Highway* is mis-
 2 placed. That case concerned a situation where a district court stayed a case to allow for arbitration
 3 proceedings "in a foreign country when it remain[ed] unclear whether [the party opposing the stay]
 4 even agreed to arbitrate and where a foreign court has already levied legal and equitable penalties
 5 against it." *Dependable Highway*, 498 F.3d at 1066. Under those circumstances, the "indefinite
 6 stay" could cause "undue delay" because there was "no specific deadline for when the stay will
 7 terminate" and "[i]n the nearly *two years* that have passed since the [stay] order issued, [the court
 8 had] received no indication that any arbitration proceedings ha[d] commenced[,] . . . let alone con-
 9 cluded." *Id.* at 1066-67 (emphasis added). So the Ninth Circuit reversed that stay order because
 10 both "the stay [was] likely to do damage to [the party opposing the stay], and it is unclear when
 11 the stay might lift, if at all." *Id.* at 1067.

12 Here, by contrast, there are no such concerns. There is no question NetChoice has a right
 13 to an appeal. *See* 28 U.S.C. § 1292(a)(1). Nor can there be any argument that the Ninth Circuit is
 14 imposing "legal and equitable penalties against" Defendant that counsel against a stay. *Dependable*
 15 *Highway*, 498 F.3d at 1066. Rather, staying proceedings while the Ninth Circuit considers an
 16 expedited appeal is precisely the sort of temporary delay that is well within this Court's authority
 17 to grant.

18 **II. The Ninth Circuit's resolution of the appeal will provide the parties and the Court
 19 with useful guidance as to the remainder of proceedings and will promote judicial
 efficiency.**

20 Proceedings in this Court should await the Ninth Circuit's resolution of what this Court
 21 called "novel, difficult, and important" questions. ECF 47 at 4. Everything from the scope of dis-
 22covery to the timing for dispositive motions may depend on what the Ninth Circuit holds—and
 23 when. So a stay of proceedings would promote judicial efficiency. *Harville*, 2023 WL 4535476,
 24 at *1; *see* ECF 59 at 3-4.

25 Defendant responds that the Ninth Circuit's "disposition of appeals from *most* preliminary
 26 injunctions *may* provide little guidance as to the appropriate disposition on the merits." ECF 62 at
 27 2 (emphases added) (quoting *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018)). But Defendant
 28 does not explain why *this* is such a case where the appeal will provide "little guidance." To support

1 his arguments, Defendant repeatedly cites *this Court's* discussion of NetChoice's arguments and
 2 the factual inquiries they purportedly require. *E.g., id.* at 2-3.

3 But the Ninth Circuit may differ from this Court in its evaluation of NetChoice's claims
 4 and what further factual development they require, if any. The Ninth Circuit already granted
 5 NetChoice an injunction pending appeal after applying the same "standard . . . employed by district
 6 courts in deciding whether to grant a preliminary injunction." ECF 58. That standard includes an
 7 evaluation of likelihood of success on the merits. *Feldman v. Ariz. Sec'y of State*, 843 F.3d 366,
 8 367 (9th Cir. 2016). So there is substantial reason to believe that the Ninth Circuit's appellate
 9 proceedings will outline a different legal analysis for NetChoice's claims, and one that requires
 10 different factual showings. For instance, the Ninth Circuit may well disagree with this Court that
 11 "much of the First Amendment analysis depends on a close inspection of how regulated feeds
 12 actually function." ECF 39 at 22. If so, there would be no need into discovery to facilitate that
 13 "close inspection." Before discovery begins, therefore, the parties should know what legal issues
 14 remain.

15 Nevertheless, Defendant would have this Court leapfrog the Ninth Circuit entirely. That
 16 would be inefficient. The best illustration of the inefficiency is Defendant's proposal that this Court
 17 set a case management schedule that could ignore the Ninth Circuit's eventual decision entirely.
 18 ECF 61 at 3-4. For example, Defendant proposed setting the "last day to serve written discovery
 19 and deposition notices" for April 4, 2025—which is a mere two days after just the *oral argument*
 20 in the Ninth Circuit. ECF 60 at 3. That would result in inefficient discovery proceedings. There is
 21 a near-certainty that the parties will serve discovery requests that lack the Ninth Circuit's guidance
 22 about the relevant inquiries. In addition, Defendant proposed that the parties would submit their
 23 opening summary judgment motions on October 17, 2025. *Id.* at 4. But there is no guarantee that
 24 the Ninth Circuit will have issued its decision by that date, even though the Ninth Circuit has
 25 expedited the appeal. So Defendant's proposal raises a pronounced risk that the parties will need
 26 to engage in even more briefing to adapt to the Ninth Circuit's decision. And all of this discovery
 27
 28

1 and briefing may take place *before Defendant has even filed a responsive pleading*—because Defendant’s responsive-pleading deadline depends on resolution of the Ninth Circuit’s appeal.
 2 ECF 59 at 3-4.

3
 4 Defendant does not dispute that a stay could promote efficiency in another way: by giving
 5 Defendant more time to promulgate age-assurance regulations. ECF 59 at 4 (citing ECF 18 at 7;
 6 ECF 39 at 7). That is an added benefit that could promote efficiency, by allowing this Court to
 7 resolve all of the issues raised by California Senate Bill 976.

8 **III. The First Amendment counsels in favor of a stay of proceedings to avoid hardship
 9 to NetChoice and its members.**

10 A stay would also prevent hardship to NetChoice and its members. *Harville*, 2023 WL
 11 4535476, at *1; *see* ECF 59 at 3. And a stay is especially warranted in this First Amendment case.
 12 As NetChoice has argued, the First Amendment generally requires “minimal if any discovery, to
 13 allow parties to resolve disputes quickly without chilling speech through the threat of burdensome
 14 litigation.” ECF 59 at 3 (quoting *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 469 (2007) (con-
 15 trolling plurality op. of Roberts, C.J.)). Here, that means that the contours of the First Amendment
 16 analysis should be resolved—and the boundaries of discovery firmly set—by the Ninth Circuit
 17 before Defendant is permitted to seek the “‘wide-ranging’” discovery it argues this case “de-
 18 mands.” ECF 62 at 3-4 (quoting this Court).

19 Defendant responds that the nature of the claim in *Wisconsin Right to Life* case gave rise
 20 to minimal discovery, unlike here. ECF 62 at 4. “[T]he proper standard for an as-applied chal-
 21 lenge to [the Bipartisan Campaign Reform Act, or BCRA] must . . . focus[] on the substance of
 22 the communication’ at issue. . . . [I]n *Wisconsin Right to Life*, it certainly was true that ‘minimal if
 23 any discovery’ was needed to illuminate ‘the substance of the communication’ at issue, which
 24 consisted of three specific TV ads.” *Id.* Defendant’s response illustrates an important point: The
 25 scope of permissible discovery in First Amendment cases must hew carefully to what facts are
 26 “pertinent” to prevail on the First Amendment challenge. *Ams. for Prosperity Found. v. Bonta*,
 27 594 U.S. 595, 618 (2021). Otherwise, discovery could unduly intrude into protected First Amend-
 28

1 ment activity and impose an *additional* First Amendment harm. Here, NetChoice's appeal con-
 2 cerns precisely the question of what NetChoice must show to prevail on its First Amendment chal-
 3 lenge.

4 So proceedings in this Court should await the Ninth Circuit's determination of what show-
 5 ing NetChoice must make.

6 **CONCLUSION**

7 Accordingly, NetChoice respectfully requests this Court stay proceedings while
 8 NetChoice's appeal is pending.

9 DATED: February 18, 2025

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